IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON
November 6, 2001 Session

STATE OF TENNESSEE v. JAMES CLEVELAND BREER

Direct Appeal from the Circuit Court for Henry County
No. 13028 Julian P. Guinn, Judge

No. W2001-00390-CCA-R3-CD - Filed February 7, 2002

Defendant, James Cleveland Breer, was convicted by a Henry County jury of three counts of aggravated sexual battery. Tenn. Code Ann. § 39-13-504(a)(4). In this appeal, Defendant raises the following issues: (1) whether the evidence was sufficient to convict him; (2) whether the trial court erred by allowing the jury to hear hearsay statements under the "prior consistent statement" rule; (3) whether the trial court erred by allowing the testimony of witnesses whose testimony either was not disclosed to defense counsel prior to trial or was disclosed too late for Defendant to properly prepare; and (4) whether the trial court erred by overruling Defendant's motions for a mistrial. Following a thorough review of the record, we affirm the judgment of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed.

THOMAS T. WOODALL, J., delivered the opinion of the court, in which GARY R. WADE, P.J., and JOE G. RILEY, J., joined.

Michael L. Ainley and Vicki Hoover, Paris, Tennessee, for the appellant, James Cleveland Breer.

Paul G. Summers, Attorney General and Reporter; J. Ross Dyer, Assistant Attorney General; G. Robert Radford, District Attorney General; and Steven L. Garrett, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

FACTUAL BACKGROUND

Two of the three incidents which gave rise to Defendant's convictions of aggravated sexual battery occurred in December 1998, and one occurred in January 1999. During that time, the victim in this case (who shall be referred to by her initials, B.R.) lived with her mother and Defendant, her stepfather. B.R. was ten years old and had one eight-year-old brother, Dakota. The family members lived in the basement of Defendant's mother's house while their new house was undergoing construction. B.R.'s mother worked evenings, from approximately 2:00 p.m. until 11:00 p.m. Defendant was employed as a construction worker during the day and watched the children in the

evenings. On November 19, 1999, B.R.'s mother gave birth to a son, the only child in the family fathered by Defendant.

At Defendant's trial, B.R. gave the following testimony concerning the three incidents of improper conduct leading to Defendant's arrest. Regarding the first charge of aggravated sexual battery, B.R. claimed that Defendant touched her "privates" in the family's kitchen of their basement home in December 1998. On this occasion, Defendant was preparing green beans for the children's supper. B.R. was sitting on the counter and wearing a green, silky nightgown which extended below her knees. She had panties on beneath the gown. Her brother, Dakota, was in his room playing a "Nintendo" game, and her mother was busy somewhere else, either feeding the horses or upstairs doing housework. While B.R. sat on the counter, Defendant approached her, pulled her nightgown up, and placed his hands down her panties. When B.R. asked him to stop, he removed his hands, washed them, and resumed cooking the beans. B.R. then jumped down from the counter and left the kitchen.

The second charge of aggravated sexual battery stemmed from B.R.'s claim that Defendant touched her inappropriately, again, in December 1998, while she was washing "Nickelodeon slime" from her hair in the shower. B.R. testified that the "slime" was a Christmas gift which she and her brother and Defendant had played with earlier that day. The game involved taking the slime from the container and covering each other with it. B.R. was wearing a two-piece bathing suit; her brother wore swimming trunks and a tee shirt; Defendant was bare-chested with pants on. When it came time to clean up, B.R. got into the shower with her bathing suit on to wash away the slime. Defendant requested permission to enter the bathroom. B.R. refused, but he entered anyway, got into the shower with her, and began rubbing her back, legs, and buttocks. B.R. did not know what Defendant was using to rub her buttock area, for she was too frightened to turn around. She claimed that it was "hard and stiff," however, and she knew it was not one of his hands because his hands felt differently--they were calloused and rough from doing construction work. His hands moved over her back, legs and buttocks. This episode lasted five or ten minutes before Defendant got out of the shower and left the bathroom. B.R.'s mother was at work when this occurred, and her brother was either playing Nintendo or watching television.

The third incident occurred in January 1999, while B.R.'s mother was again at work and her brother was either playing with his Nintendo game or outside with the dog. This time, B.R. claimed that Defendant approached her while she was sitting on the couch watching the "Simpsons" program on television. Defendant came over to her, unzipped her blue jeans, and then reached down inside her panties and started rubbing her. B.R. cried "ouch" and told him to "stop," but Defendant ignored her. He asked her whether she "liked it." She replied "no" and asked him to "stop" a second time. He then stopped and warned her that, if she told anyone about what had happened, he would hurt her.

The three incidents, as described above, were initially related by B.R. to her mother sometime in November 1999. Defendant and B.R.'s mother had only been married about a year at that time. At Defendant's trial, B.R. testified that she told her mother of Defendant's inappropriate behavior because she had grown weary of Defendant's strict disciplinary methods and sexual abuse. According to B.R., Defendant used to take her and her brother to a nearby gravel pit and "whoop"

them when they misbehaved. The testimony of B.R.'s mother revealed that this was done with her knowledge and permission. She had previously had problems with B.R. lying, stealing, and forging signatures on papers from school. Defendant took the children to the gravel pit because, if heard, their cries would have upset Defendant's mother who lived above their home. B.R. and her mother had an argument after B.R. told her what Defendant had done to her. B.R.'s mother told B.R. to pack her things, and then drove she and her brother, Dakota, to their maternal grandmother's house to live.

During a hearing before the juvenile court on July 14, 2000, B.R. recanted her story concerning Defendant's unlawful conduct. Prior to her recantation, Defendant, B.R.'s mother, and her grandmother were removed from the courtroom, and the judge questioned B.R. concerning whether she knew the difference between the truth and a lie. B.R. answered in the affirmative, and then proceeded to tell the judge that "nothing ever happened." In November 2000, at Defendant's trial, B.R. admitted lying to the juvenile court judge, claiming that she recanted her allegations because she wanted to live with her mother again. B.R. testified that, ever since she revealed what had happened between her and Defendant, she had felt "sad, scared, and worried." Consequently, she recanted in an effort to "make everything go away."

During cross-examination, B.R. admitted that she had frequently been in trouble for lying and stealing both at school and at home. She also admitted to forging Defendant's signature in her student planner (which attests to completion of homework assignments) and that she had related different "facts" or versions of the three incidents regarding Defendant to different people, notwithstanding the recantation. For instance, she told one person she had been watching the "Simpsons" television program when Defendant touched her, and she told another that she was watching "Pacific Blues"; she told one person she was on the couch when Defendant unzipped her pants and another that she was sitting in a recliner chair; and, she told one person that her brother was playing outside when Defendant touched her, and another that he was inside playing Nintendo. Defendant's attorney elicited numerous additional alleged examples of B.R.'s inability to tell the truth to demonstrate her lack of credibility, which were similar to the above examples.

Shauna Adams, B.R.'s fourth grade teacher, testified that in February 2000, B.R. informed her of the facts underlying the charges against Defendant. Adams said that, prior to B.R.'s revelation, B.R. appeared to be constantly "on the verge of breaking down," often crying easily and over very small things. When B.R. finally confided in her, Adams immediately took her to see the guidance counselor at the school. Afterward, she was a different child for it appeared "as if the world had been lifted off her shoulders."

William Gary VanDiver, an investigator with the Henry County Sheriff's Department, testified that the Department of Children's Services contacted him in February 2000, after being alerted to B.R.'s situation by the guidance counselor at her school. VanDiver spoke with B.R. shortly thereafter, and his reiteration of B.R.'s initial complaints indicated that they were essentially identical to her version of the three events as related by her trial testimony. VanDiver was also present when B.R. recanted her allegations during the juvenile court hearing in July 2000. In a subsequent conversation with B.R. as to why she recanted, B.R. confessed that she believed she

could get back with her mother if she changed her story, notwithstanding the fact that the juvenile court informed her that changing her statement would not entitle her to go home. She told VanDiver that she loved her mother and that "she would tell [the police] if it ever happened to her again." VanDiver further testified that, when she retracted her recantation in October 2000, B.R.'s account of the incidents were again consistent with her February 2000 statement.

When VanDiver spoke with Defendant conceming the allegations against him, Defendant gave him the following statement which VanDiver read into evidence at trial:

> I, James C. Breer, the stepfather of [B.R.] and Dakota Rowlette, I remember an incident, do not remember time, when [B.R.], Dakota, and I played with play dough type stuff called slime. [B.R.] and I got it all over us. Afterwards I washed [B.R.'s] hair while she was in the shower stall. She had her back to me. I had on boxer shorts. I did not get in the shower with her, nor did I touch her body anywhere, other than her hair.
>
> I, in my heart, do not believe I have ever touched [B.R.] in a sexual way. If I have, I want to tell her I am sorry. If something has happened, it may be because of the drinking.

VanDiver further testified that Defendant gave the statement voluntarily and that he cooperated with the police during the investigation.

Carolyn Jean Gore, a social worker with the Department of Children's Services, testified that she interviewed B.R. in February 2000 and reiterated what B.R. said to her. The allegations were similar in all relevant respects to B.R.'s testimony at trial. Gore also testified that on July 9, 2000, she was notified that B.R.'s mother had taken B.R. from the grandmother's house and planned to go home with her. Upon further investigation, Gore learned that this occurred after B.R.'s brother, Dakota, had spent the night with their mother. When the mother returned Dakota to his grandmother's, B.R. wanted to spend the night also, but the mother said, "You can't come because of all this other stuff that you've said." B.R. became very upset and cried. That Saturday, B.R.'s mother picked her up and took her for a ride, after which she told the grandmother that B.R. would be returning home to live with her. When asked whether this episode occurred shortly before the hearing during which B.R. recanted her allegations against Defendant, Gore testified that she did not know.

Janice Martin, a psychologist, testified that B.R. was referred to her for treatment, evaluation, and support by the Department of Children's Services. During her testimony, Martin reiterated the information she received from B.R. concerning Defendant's behavior during the kitchen counter, shower, and couch episodes. In all relevant aspects, the stories were similar to B.R.'s testimony at trial.

Theresa Marshall was appointed guardian ad litem for B.R. in July 2000. Marshall testified at trial that, during their first conversation, B.R. "flat-out" denied that anything happened. Then, in

a discussion subsequent to B.R.'s retraction of the recantation, Marshall asked her why she initially told her that "nothing happened." B.R. began to cry and replied, "I thought if I said nothing happened, that all of this would go away, and I could go back to my mother and my brother." Marshall also questioned B.R. as to her reason for other discrepancies which had appeared in her statement of the incidents, namely, a claim that Defendant only touched the outside of the garments covering her private areas. B.R. responded that "[Defendant] probably wouldn't get in as much trouble if she testified to that. Then her mother would not be mad at her." Since B.R. left her grandmother's house in July 2000, she has been in foster care. Her brother, Dakota, went home to be with his mother who remained living with Defendant.

In her testimony, Marshall recounted the information she received from B.R. in October 2000 concerning the kitchen counter, shower, and couch episodes. In all relevant aspects, the stories she received were similar to B.R.'s testimony at trial. B.R. had also informed Marshall that her original statement to the Department of Children's Services was the truth. During cross-examination, Marshall admitted discovering that B.R. had a history of being untruthful and that, in fact, B.R. even confessed to her that she "lied a lot."

Tamela May Breer, B.R.'s mother, testified that, prior to meeting Defendant, she had numerous problems with her two children, i.e., lying, stealing, disobedience, and a lack of controllability. However, after her relationship with Defendant began, the children became more obedient, told fewer "stories," and quit stealing. Ms. Breer testified that Defendant "spanked" the children with her knowledge and consent.

Ms. Breer further testified that she learned of B.R.'s allegations concerning Defendant during an argument over B.R.'s school work. B.R. told her mother that she was "being mean to her, like [Defendant] was being mean to her" and that her mother "just don't know what happened to her." When Ms. Breer asked B.R. to explain, B.R. said that "[Defendant] touched her." Without hearing anything further, Ms. Breer packed both children some clothes and took them to their grandmother's house to stay for a while. She did this so that the children would not be privy to her discussion with Defendant or interfere with her own investigation of the matter. Following an interrogation of her son, Dakota, and a confrontation with Defendant, Ms. Breer determined that her daughter was not telling her the truth. She based her determination, in part, on her belief that during the eleven years she had lived with B.R., she has "never gotten a true story out of her." She blamed herself, for she viewed B.R.'s inability to tell the truth as the result of a lack of discipline and instruction on right and wrong in her upbringing.

When Ms. Breer was questioned as to whether she attempted to coerce B.R. into recanting her statement, she replied negatively. During cross-examination, she admitted to visiting B.R. in July 2000, on the weekend prior to the recantation of her statement in juvenile court. Ms. Breer explained that she had only stopped by to drop off her son, Dakota, who had spent his vacation with her. B.R. wanted to go for a ride, so the two of them drove around while B.R. complained that her feelings were hurt because she was not taken with them on vacation. Ms. Breer explained that she was left behind because the court order forbade B.R. from having any contact with Defendant. B.R. then confessed to her mother that she was jealous of Defendant. B.R. claimed that "nothing ever

happened," but Ms. Breer told her that, as her mother, she could do nothing about it because the restrictions were pursuant to the court's order. She further claimed that at no time did she attempt to coerce her daughter into changing her story.

ANALYSIS

I. Sufficiency of the Evidence

Defendant contends that the trial court erred by failing to grant his motions for judgment of acquittal on the ground that the evidence was not sufficient to sustain his convictions. We disagree.

When evidentiary sufficiency is questioned on appeal, the standard of review is whether, after considering all the evidence in the light most favorable to the State, any rational trier of fact could have found all the essential elements of the offense beyond a reasonable doubt. See Jackson v. Virginia, 443 U.S. 307, 318-319, 99 S. Ct. 2781, 2789, 61 L. Ed. 2d 560 (1979); State v. Hall, 8 S.W.3d 593, 599 (Tenn. 1999); Tenn. R. App. P. 13(e). In determining the sufficiency of the evidence, we will not reweigh the evidence or substitute our own inferences for those drawn by the trier of fact. State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978); Liakas v. State, 286 S.W.2d 856, 859 (Tenn. 1956). Instead, on appeal, the State is entitled to the strongest legitimate view of the evidence and to all reasonable and legitimate inferences that may be drawn therefrom. Hall, 8 S.W.3d at 599. A guilty verdict by a jury, approved by the trial court, accredits the testimony of the witnesses for the State and resolves all conflicts in favor of the prosecution's theory, effectively removing the presumption of innocence and replacing it with a presumption of guilt. See State v. Bland, 958 S.W.2d 651, 659 (Tenn. 1997). Questions concerning the credibility of witnesses, the weight and value of evidence, and factual issues raised by the evidence are matters to be resolved by the trier of fact, not this Court. Id. The defendant bears the burden of demonstrating that the evidence is insufficient to support his or her conviction. State v. Pike, 978 S.W.2d 904, 914 (Tenn. 1998); State v. Tuggle, 639 S.W.2d 913, 914 (Tenn. 1982).

The jury convicted Defendant of three counts of aggravated sexual battery, which is defined as an "unlawful sexual contact with a victim by the defendant," accompanied by one of four enumerated circumstances. Tenn. Code Ann. § 39-13-504(a) (1997). In the instant case, the relevant circumstance requires that the victim be "less than thirteen (13) years of age." Id. § 39-13-504(a)(4). Thus, guilt of this offense may be sustained if a rational trier of fact could have found that the evidence sufficiently established that sexual contact occurred and the victim was less than thirteen years of age. Sexual contact "includes the intentional touching of the victim's . . . intimate parts, or the intentional touching of the clothing covering the immediate area of the victim's . . . intimate parts, if that intentional touching can be reasonably construed as being for the purpose of sexual arousal or gratification" and the term "intimate parts" specifically includes the genital area. Id. § 39-13-501(2), (6).

Defendant's contention that the evidence does not support his convictions is based entirely upon his premise that the lack of credibility demonstrated by the victim in this case precludes reliance upon her testimony. Although one may logically argue that the victim's ability to tell the

truth is uncertain, questions concerning the credibility of a witness and the weight to give the related testimony are matters entrusted exclusively to the trier of fact. See Bland, 958 S.W.2d at 659; Cabbage, 571 S.W.2d at 835. Moreover, in our role as the reviewing court, we are required to afford the prosecution the strongest legitimate view of the evidence in the record, as well as all reasonable and legitimate inferences which may be drawn from the evidence. State v. Keough, 18 S.W.3d 175, 181 (Tenn. 2000). The jury observed the demeanor of the victim in this case and heard her testimony, as well as the testimony of family members and other witnesses. In addition, Defendant presented proof to demonstrate the equivocal nature of the victim's statements. Consequently, we find that the available and relevant proof required to properly determine what weight would be appropriate to give the victim's testimony was presented to the jury. Thereafter, the jury found the victim's credibility sufficient to find Defendant guilty beyond a reasonable doubt.

As a separate issue in his brief, Defendant argues that because there was no medical proof to corroborate the victim's testimony, the evidence is insufficient to support his conviction. The gist of this argument concerns evidentiary sufficiency which was addressed by this Court supra. Our research indicates that in prosecutions for sexual battery, the law does not require that the State corroborate the victim's testimony with medical proof that the offense was committed. See State v. Howard, 617 S.W.2d 656, 658 (Tenn. Crim. App. 1981) (the fact that medical testimony could not confirm nor rule out sexual abuse is a matter of weight for the jury). Moreover, because the definition of sexual battery embodies "touching," physical evidence of contact is not a practical requirement. Taken in the light most favorable to the State, there is sufficient evidence in the record to support the convictions. Defendant is not entitled to relief on his challenges to the sufficiency of the evidence.

II. Admissibility of Prior Consistent Statements

Defendant contends that the trial court erred when it allowed the jury to hear the hearsay testimony of various witnesses under the "prior consistent statement" rule, providing for admissibility of hearsay statements under certain circumstances. Defendant concedes that the hearsay testimony in issue was necessary to rehabilitate the victim's testimony and that the trial court gave the jury proper instructions regarding their consideration of hearsay statements. However, he argues that the jury clearly misconstrued the hearsay testimony as substantive evidence, i.e., proof of the truth of the matter asserted, rather than a mere effort on the part of the State to lend credibility to the testimony of the victim, its chief witness. Defendant submits that because the evidence used to convict him was improper for this purpose, his conviction cannot stand. We disagree.

As a preliminary matter, we note that Defendant failed to object to the witnesses' testimony on this specific ground at the time the testimony of these witnesses was presented. It is well-settled that a defendant waives any objection to a witness' testimony by his failure to raise the issue at trial, thereby preventing the trial court an opportunity to rule on the matter before the witness begins his testimony before the jury. See Tenn. R. App. P. 36(a); see also State v. Smith, 24 S.W.3d 274, 280 (Tenn. 2000) (a failure to object to otherwise inadmissible evidence will allow that evidence to be considered as if it were, in fact, fully admissible under the law of evidence); State v. Eldridge, 951 S.W.2d 775, 783-84 (Tenn. Crim. App. 1997) ("Ordinarily, the failure to take available action to

prevent or nullify the alleged error waives the issue."). Even if not waived, this issue would not entitle Defendant to relief for the reasons following.

Defendant's brief does not allege a specific witness' "hearsay testimony" was admitted in error. Rather, it claims that "all of the hearsay witnesses repeated with convincing zeal the story of the alleged victim, as the story had been told to them" and the jury then erred when it considered them "fact witnesses," testifying to the truth of the matter asserted. According to the record, four State witnesses reiterated the victim's story concerning the kitchen counter, shower, and couch incidents: William Gary VanDiver, the investigator for the Henry County Sheriff's Department; Carolyn Jean Gore, the social worker with the Department of Children's Services; Janice Martin, the psychologist called by the Department of Children's Services to assist with the case; and Theresa Marshall, the appointed guardian ad litem for B.R. All four witnesses corroborated B.R.'s account of the incidents in all essential details as she related them both in November 1999 and, again, at trial. Importantly, the record also reveals that the testimony of the "hearsay witnesses" occurred after Defendant's cross-examination of B.R., during which his counsel expended considerable effort to cast doubt upon her credibility.

Regarding admissibility of evidence in general, "[i]t is well-established that trial courts have broad discretion in determining the admissibility of evidence, and their rulings will not be reversed absent an abuse of discretion." State v. Stinnett, 958 S.W.2d 329, 331 (Tenn. 1997) (citations omitted). Out of court statements are generally not admissible because they are considered to be hearsay. See Tenn. R. Evid. 801, 802. This includes prior consistent statements offered to bolster the witness' credibility. See Farmer v. State, 296 S.W.2d 879, 882 (Tenn. 1956); State v. Braggs, 604 S.W.2d 883, 885 (Tenn. Crim. App. 1980).

A well-established exception exists when the prior consistent statement is offered to rehabilitate a witness after a witness has been impeached by a prior inconsistent statement, or when insinuations of recent fabrication have been made or deliberate falsehood implied. See Farmer, 296 S.W.2d at 882; State v. Hodge, 989 S.W.2d 717, 724-25 (Tenn. Crim. App. 1998) (prior consistent statement admissible to rehabilitate a witness after accusations of falsehood arose); State v. Tizard, 897 S.W.2d 732, 746 (Tenn. Crim. App. 1994); State v. Benton, 759 S.W.2d 427, 433 (Tenn. Crim. App. 1988). Where evidence of a prior consistent statement is introduced to rehabilitate a witness after impeachment by a prior inconsistent statement, at least two requirements must be satisfied: The consistent statement must have been made before the inconsistent one, Tizard, 897 S.W.2d at 746, and the witness' testimony must have been attacked to the extent that it needs rehabilitating. Benton, 759 S.W.2d at 434.

The prior consistent statements in issue were made prior to B.R.'s recantation in July 2000 and they were offered to rehabilitate B.R. after her impeachment by Defendant's counsel. As such, they were properly admissible. As noted in Neil P. Cohen et al., Tennessee Law of Evidence § 801.8 (4th ed. 2000), a prior consistent statement admitted to rehabilitate the witness is not hearsay because it is not offered "to prove the truth of the matter asserted in the statement."

Defendant's argument that the jury erred by improperly considering the "hearsay testimony" is likewise without merit. The record reflects that the trial judge instructed the jury during the testimony of Martin, the psychologist, that it was not to consider B.R.'s statements to other persons as substantive evidence of the truth of the matter contained or asserted in the statements. Rather, the jurors must "consider them only as reflecting on the credibility of the child . . . a statement as to the child's credibility." In the absence of evidence to the contrary, it may be assumed that the jury followed the trial judge's instructions. State v. Barton, 626 S.W.2d 296, 298 (Tenn. Crim. App. 1981).

In his brief regarding this issue, Defendant again argues that his case should be dismissed or a new trial granted because the State presented "no corroborative proof in any form or fashion concerning the alleged victim's recanted statements." However, as previously noted, we are unconvinced that corroboration of the victim's statements is required prior to finding Defendant guilty of the offenses charged. See State v. McKnight, 900 S.W.2d 36, 48 (Tenn. Crim. App. 1994) ("A defendant can be convicted of simple rape based solely upon testimony of the victim," when the proof of the charge is sufficiently clear to satisfy the jury that the defendant is guilty beyond a reasonable doubt. (citations omitted)). Indeed, the majority of sex abuse offenses involving minor children are committed during situations where only the victim and the perpetrator are present. Moreover, in cases of sexual battery, where the requisite "sexual contact" may involve only "the intentional touching of the clothing covering the immediate area of the victim's . . . intimate parts," no medical evidence would be expected in most circumstances. See Tenn. Code Ann § 39-13-501(6) (1997).

Defendant relied upon this Court's decision in State v. Donny Ray Smith, No. 02C01-9805-CC-00151, 1999 WL 250593, Henry County, (Tenn. Crim. App., Jackson, April 29, 1999) to support his argument that corroboration of the victim's allegations is required to convict him. This decision was reversed by our supreme court in State v. Smith, 24 S.W.3d 274 (Tenn. 2000). In any event, Smith addressed the issue of corroboration of a defendant's confession.

In sum, since our rules of evidence provide for admissibility of prior consistent statements under the circumstances presented here, the record reveals that the jury received proper instructions regarding how it may consider the statements, and we may presume that the jury followed the trial court's instructions, Defendant is not entitled to relief on this issue.

III. Prior Disclosure of Witnesses

Defendant also contends that the trial court erred in allowing the State to present the testimony of two witnesses: the psychologist, Janice Martin, and the victim's school teacher, Shauna Adams. Regarding Martin's testimony, Defendant asserts that because the State failed to disclose its intention to call Martin as a witness until thirteen days before trial, he was unable to prepare an adequate cross-examination and prohibited from conducting an independent evaluation or securing his own expert witness. With regard to Adams, Defendant contends that the State's failure to include her name on the witness list effectively "ambushed" him at trial. Defendant maintains that this resulted in his inability to prepare a proper cross-examination of Adams or obtain rebuttal witnesses,

both of which were necessary because Adams' testimony was "extremely damaging" to Defendant's case. We disagree.

Tennessee Code Annotated section 40-17-106 directs the State to list "the names of such witnesses as [it] intends shall be summoned in the cause" on the charging indictment. See also Tenn. Code Ann. § 40-13-107; Tenn. R. Crim. P. 16, Advisory Commission Comments. The purpose of this statute is to prevent surprise to the defendant at trial and to permit the defendant to prepare his or her defense to the State's proof. This duty is merely directory, not mandatory, however, and therefore the State's failure to include a witness' name on the indictment does not automatically disqualify the witness from testifying. State v. Harris, 839 S.W.2d 54, 69 (Tenn. 1992) ("Rule 16, Tenn. R. Crim. P., does not require nor authorize pretrial discovery of the names and addresses of the State's witnesses.") In cases of nondisclosure, a defendant must demonstrate prejudice, bad faith, or undue advantage to obtain relief. Id. The determination of whether to allow the witness to testify is left to the sound discretion of the trial judge, which is exercised upon examination of the circumstances presented in that particular case. State v. Underwood, 669 S.W.2d 700, 703 (Tenn. Crim. App. 1984) (citing McBee v. State, 372 S.W.2d 173 (Tenn. 1963)).

First, we observe that Martin did not testify as an expert witness. Prior to trial, on November 10, 2000, Defendant filed a motion in limine to suppress Martin's testimony. In an order dated November 15, 2000, the trial court ruled that Martin may testify for impeachment purposes, but limited the testimony in that no references may be made to any tests or evaluations which resulted from her treatment of the victim. Martin subsequently testified that B.R. was referred to her for treatment and evaluation by the Department of Children's Services, and then reiterated the information received from B.R. concerning the kitchen counter, shower, and couch episodes. In all relevant aspects, Martin's testimony was similar to B.R.'s testimony at trial.

Because Martin's testimony was offered to rehabilitate B.R.'s testimony, and the testimony remained, at all times, within the parameters of the trial court's order, we fail to comprehend how independent evaluations and expert witnesses for the defense were necessary to rebut her testimony. Consequently, we find that Defendant receiving late notification that Martin would testify did not hamper his cross-examination or prejudice his case.

Defendant's argument that the State's failure to include Adam's name on the witness list effectively "ambushed" him at trial and rendered him unable to prepare a proper cross-examination or obtain rebuttal witnesses is likewise without merit. The record reveals that, immediately after Adams was called to testify, Defendant objected on the ground that Adams' name was not on the State's list of witnesses given him during discovery. The State responded that Adams' name was listed as a potential witness in a typed "narrative" or "plan," which was provided to Defendant prior to trial. After examining the "narrative" provided Defendant, the trial court allowed Adams' testimony, based on its finding that Defendant was not "surprised" by the testimony and because Defendant's cross-examination of the victim allowed the State to present prior consistent statements by the victim for purposes of rehabilitation.

We first observe that the document which is referred to as the State's "narrative" in the transcript and then examined by the trial court is not included in the record before us. It is the defendant's responsibility to provide a complete record on appeal. State v. Troutman, 979 S.W.2d 271, 274 (Tenn. 1998). As previously noted, the determination of whether to allow the witness to testify is left to the sound discretion of the trial judge. Underwood, 669 S.W.2d at 703. We may presume that the trial court's ruling is correct in the absence of an adequate record on appeal. State v. Oody, 823 S.W.2d 554, 559 (Tenn. Crim. App. 1991). Thus, Defendant is not entitled to relief. Moreover, nondisclosures of this nature will not afford a defendant relief unless he can demonstrate that prejudice resulted from the omission, Underwood, 669 S.W.2d at 703, which Defendant has failed to do.

Finally, Defendant argues that the trial court should have granted him a continuance, based on the nondisclosure by the State. A continuance may be granted at the request of defense counsel in cases where additional witnesses are added to the State's list and the defendant contends he has not had sufficient opportunity to interview such witnesses. State v. Crabtree, 655 S.W.2d 173, 177 (Tenn. Crim. App. 1983). The trial court's determination whether a continuance is required to ensure the defendant is not unfairly prejudiced is left to the discretion of the trial judge, and will not be disturbed on appeal unless the record shows an abuse of that discretion. Id. Since the record on this specific issue is incomplete, we find no abuse of discretion on the part of the trial court. For the above reasons, Defendant is not entitled to relief on this issue.

IV. Mistrial

Defendant also contends that two separate incidents occurring at the close of his trial warranted the declaration of a mistrial and that the trial court erred in overruling his motions for same. We disagree.

The first incident cited by Defendant involves the prosecutor's conduct during his closing argument. According to Defendant, the prosecutor made remarks that were "inflammatory," "prejudicial," and "invaded the province of the jury." Defendant alleges that the prosecutor also pointed his finger at various jurors, to the extent that some of them "flinched" in response. In sum, Defendant contends that the prosecutor's actions were improper because they were emotionally charged and designed to inspire the jurors to make their decision based on rage, rather than common sense.

In overruling Defendant's motion for a mistrial, the trial court stated the following: "I heard the language, and there are always emotions involved in cases where children are involved . . . I'm of the opinion that the manner in which the statements were made, considering the tone and the delivery, were not unduly emotional, and they *certainly* weren't prejudicial in this case." (Emphasis added.)

Courts in Tennessee have long recognized that closing arguments are a valuable privilege that should not be unduly restricted. See State v. Sutton, 562 S.W.2d 820, 823 (Tenn. 1978) (citing Smith v. State, 527 S.W.2d 737 (Tenn. 1975)). Consequently, attorneys are given great leeway in

arguing their positions before the jury, and the trial court has significant discretion in controlling these arguments, to be reversed only upon a showing of an abuse of that discretion. Id. We have reviewed the State's closing argument and find nothing that exceeded the bounds of propriety or caused improper prejudice to Defendant. Therefore, we also find the trial court did not abuse its discretion when it refused Defendant's request to grant a mistrial on this basis.

The second incident concerns an emotional outburst by the victim's grandmother. According to Defendant, while the jury was filing out of the courtroom for a recess toward the end of trial, the victim's grandmother directed disparaging and hostile comments at Defendant and his counsel, remarks which were overheard by the jury. The trial judge was not present at the time. When the trial court reconvened, Defendant reported the outburst to the judge and moved for a mistrial, arguing that the grandmother's conduct was "hostile" and "violent" to the extent that it prejudiced the jury against him.

The record reflects that, in response to Defendant's motion, the trial court questioned Defendant's two attorneys and the witness, Adams, who was present during the outburst. Based on the information received from these sources, the trial court determined that the incident had "not reached prejudicial proportions." In addition, the record reveals that the trial court offered to give the jury a curative instruction, specifically, "to instruct the jury that what they may or may not have seen has no bearing whatsoever on how they decide this case," and Defendant declined the trial court's offer.

The decision of whether to grant a mistrial is within the sound discretion of the trial court. State v. McKinney, 929 S.W.2d 404, 405 (Tenn. Crim. App. 1996). This Court will not disturb that decision absent a finding of an abuse of discretion. State v. Adkins, 786 S.W.2d 642, 644 (Tenn. 1990). "Generally, a mistrial will be declared in a criminal case only when there is a 'manifest necessity' requiring such action by the trial judge." State v. Millbrooks, 819 S.W.2d 441, 443 (Tenn. Crim. App. 1991). "It is only when there is no feasible and just alternative to halting the proceedings that a manifest necessity is shown." State v. Mounce, 859 S.W.2d 319, 322 (Tenn. 1993) (citing State v. Knight, 616 S.W.2d 593, 596 (Tenn. 1981)).

Under the circumstances presented here, we concur with the trial court's determination that a mistrial was not warranted. The situation created by the grandmother was not one in which no feasible and just alternative to halting the proceedings existed. Adams, the witness questioned by the trial court about the incident, gave the following account: "The grandmother was obviously very upset with what had taken place in the closing arguments. And she did call [defense counsel's] name . . . she was upset in that manner. But as far as threats, I never heard any verbal threat come from her mouth . . . she kept shaking her head, you know, like someone who is visibly upset . . . [and] pointed her finger . . . ." Because Defendant refused the obvious and most practical solution, a curative instruction, and we find that the account of the event as related by an arguably disinterested party revealed no evidence of "manifest necessity," a mistrial was not warranted in this case. Defendant is not entitled to relief on this issue.

CONCLUSION

For the forgoing reasons, we AFFIRM the judgment of the trial court.

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THOMAS T. WOODALL, JUDGE